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Legal Sidebar

Supreme Court Determines Clear and Convincing Evidence Not Required for Admissibility Determinations for Returning Lawful Permanent Residents

November 19, 2026

Under the Immigration and Nationality Act (INA), a lawful permanent resident (LPR) returning to the United States from a temporary trip abroad is not considered to be applying for admission into the United States upon return unless one of six exceptions applies, including if a Department of Homeland Security (DHS) Customs and Border Protection (CBP) officer determines that the LPR has committed certain statutorily specific offenses. The statute is silent as to how a CBP officer determines if a returning LPR "has committed an offense." Resolving a circuit conflict, the Supreme Court, in a 6-3 decision, held in *Blanche v. Lau* that there is no evidentiary standard in the INA that mandates how a CBP officer determines whether an LPR has committed a specified offense and, as such, whether the alien may be regarded as seeking admission rather than as already admitted into the United States. Therefore, a CBP officer is not required to have clear and convincing evidence to determine that the LPR, returning to the United States after a brief absence, shall be regarded as an *applicant seeking admission* under certain statutorily defined circumstances. Congress might consider leaving the statute as is, or, alternatively, codifying the clear and convincing evidence standard the Board of Immigration Appeals (BIA) established.

Statutory Background and Legal Framework

An alien with LPR status is legally allowed to live and work in the United States permanently, and such status is generally a prerequisite to later obtain U.S. citizenship. An individual's LPR status, however, can be rescinded or the individual could lose that status if placed in removal proceedings and ordered removed from the United States.

Under 8 U.S.C. § 1101(a)(13)(C), an LPR who takes a temporary trip abroad typically does not have to reapply for admission when returning to the United States. Upon return, that statute provides that these individuals "shall not be regarded as seeking an admission into the United States" and only need to

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LSB11502

present valid documentation to be readmitted into the United States. There are six exceptions outlined in the statute in which a returning LPR is treated as an applicant for admission after a trip abroad, including if the LPR has committed a criminal offense listed under 8 U.S.C. § 1182(a)(2). Offenses under this statute include a "crime involving more turpitude" and "a violation of . . . any law . . . relating to a controlled substance." DHS typically exercises its discretionary authority to parole these LPRs into the United States for prosecution of these crimes under § 1182(d)(5)(A). Through parole, the returning LPR may be allowed to physically enter the country but "shall not be considered to have been admitted."

A returning LPR deemed by DHS to be an applicant for admission who is paroled into the United States for prosecution and who is later placed in removal proceedings under § 1229a following a conviction is typically charged as being an inadmissible alien (i.e., one who has not been admitted into the United States) rather than being a deportable alien (i.e., lawfully admitted aliens who have committed an immigration violation rendering them removable). This categorization is significant because, under the INA, the list of criminal offenses that may make an individual subject to removal as an inadmissible alien is different than those that would make an individual removable as a deportable alien. For example, the grounds for inadmissibility cover an unadmitted alien *who admits to or is convicted of* an offense that constitutes a crime involving moral turpitude (CIMT), whereas the grounds for deportability apply to an admitted alien who is *convicted* of a CIMT within a certain time frame and for which a sentence of a year or longer could be imposed (there is also a separate ground for multiple CIMT criminal convictions). In addition, an alien who is charged as being an inadmissible alien and who is in removal proceedings has the burden of proof in establishing he or she is "clearly and beyond doubt entitled to be admitted" (whereas for an alien who is charged as being a deportable alien, the burden of proof for establishing removability is on DHS).

Procedural History of *Blanche v. Lau*

Muk Choi Lau was admitted to the United States as an LPR and was charged years later with trademark counterfeiting under New Jersey law. While his criminal case was pending, Mr. Lau temporarily left the United States. When he returned, Mr. Lau presented himself at an international airport in New York as a returning LPR and attempted to reenter the United States. The CBP officer treated Mr. Lau as an applicant for admission rather than as a returning LPR because of his pending criminal charges and declined to admit Mr. Lau. The officer instead paroled Mr. Lau into the United States for deferred inspection under 8 U.S.C. § 1182(d)(5)(A).

Later, Mr. Lau pled guilty to trademark counterfeiting. DHS then initiated removal proceedings against Mr. Lau, charging him as being inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) as an alien convicted of a CIMT. Among other things, Mr. Lau argued before the immigration judge that removal proceedings should be terminated because, upon his return to the United States, he was improperly classified as "seeking admission . . . as an arriving alien" instead of admitted as a returning LPR. DHS argued that termination was improper because Mr. Lau fell under one of the six exceptions in § 1101(a)(13)(C) and was an applicant for admission because, when he presented himself at the airport upon his return, DHS determined that he had committed an offense identified in 8 U.S.C. § 1182(a)(2).

The immigration judge found Mr. Lau inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) and ordered him removed. The immigration judge concluded that Mr. Lau had been properly classified as an inadmissible alien because he had already committed the criminal offense when he sought to reenter the United States, notwithstanding the fact that he had not yet been convicted. Mr. Lau appealed the immigration judge's decision to the BIA, the highest administrative body that interprets and applies immigration law, and the BIA agreed with the immigration judge and dismissed Mr. Lau's appeal. In reaching its conclusion, the BIA relied on its 2011 precedential decision that "DHS bears the burden of proving by clear and convincing evidence that a returning [LPR] is to be regarded as seeking an admission," and its 2012

precedential decision that the INA did not "purport to restrict the DHS's law enforcement authority to parole a returning [LPR] until pending criminal charges potentially giving rise to inadmissibility can be resolved" or "prevent the DHS from treating a returning [LPR] as an arriving alien until an ultimate determination is made." Mr. Lau then filed a petition for review in the U.S. Court of Appeals for the Second Circuit (Second Circuit).

The Second Circuit granted Mr. Lau's petition, vacated the immigration judge's decision that ordered Mr. Lau's removal, and remanded the case to the BIA. The Second Circuit, addressing the question of whether DHS may parole a returning LPR who has been charged with but not yet convicted of a CIMT, determined "that, without a conviction, DHS will be hard pressed to prove by clear and convincing evidence that the LPR actually committed the crime in question at the time of reentry." The court reasoned that based upon BIA precedent it would be difficult for DHS to find by clear and convincing evidence that an LPR committed a qualifying crime at the time he sought reentry if the request to be admitted precedes the LPR's criminal proceedings. The court held that, in this case, Mr. Lau's pending criminal charge, alone, was not enough for DHS to meet the required clear and convincing evidence standard to show a crime had been committed and to deem Mr. Lau an applicant for admission when he attempted to reenter the country.

The Second Circuit recognized that its decision departed from decisions published by the Fifth and Ninth Circuits that, according to the Second Circuit, held "that the INA is unclear as to *when* DHS must determine whether an LPR is an applicant for admission." According to the Second Circuit, "the INA is unmistakably clear that the default presumption" for returning LPRs is that they will not be deemed to be "seeking admission *unless* certain threshold determinations have been made." The court determined that allowing DHS to make these determinations at some later time if and when there is ever a conviction "effectively nullifies [the INA's] clear command."

The Supreme Court's Decision

The government filed a petition asking the Supreme Court to review the Second Circuit's March 4, 2025, decision. On January 9, 2026, the Court granted the petition, with the question before the Court presented as "[w]hether, to remove an LPR who committed an offense listed in Section 1182(a)(2) and was subsequently paroled into the United States, the government must prove that it possessed clear and convincing evidence of the offense at the time of the LPR's last reentry into the United States." In a 6-3 decision, the Court vacated the decision and remanded the case to the Second Circuit.

Majority Opinion

Justice Thomas wrote the majority opinion for the Court, joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett. The Court held that the INA does not require CBP officers to prove by clear and convincing evidence at U.S. ports of entry that returning LPRs have committed a statutorily specific offense before deeming them applicants for admission.

The Court first explained that under the INA, a returning LPR who committed an offense under § 1182(a)(2)—like a CIMT—can be deemed to be seeking admission under § 1101(a)(13)(C)(v). The Court disagreed with the Second Circuit's holding that CBP officers at a U.S. port of entry had to establish by clear and convincing evidence that an LPR seeking reentry had committed a CIMT. According to the Court, the Second Circuit's holding regarding the clear and convincing evidence standard for deeming a returning LPR as an applicant seeking admission is not derived from statute since the INA does not impose this evidentiary standard on DHS at ports of entry. The Court concluded that DHS properly charged Mr. Lau with inadmissibility and that CBP officers "did not have the burden to establish by clear and convincing evidence that" Mr. Lau committed a CIMT.

Dissenting Opinion

Justice Jackson wrote the dissent for the Court, joined by Justices Sotomayor and Kagan. She argued that the federal government has to make some determination as to whether one of the six exceptions found in § 1101(a)(13)(C) applies before an LPR is deemed an applicant for admission. According to her, the plain text of § 1101(a)(13)(C) gives the federal government no discretion to treat a returning LPR as one who is seeking admission *unless* the CBP officer first determines the LPR fits into one of the six statutorily defined exceptions. Under the majority's holding, the dissent argued, a CBP officer at a port of entry could assume one of the exceptions in § 1101(a)(13)(C) applies to a returning LPR and rely on later-obtained evidence to prove the exception in fact did apply. This, according to her, "cannot be how Congress—the same one that took care to protect an LPR's already-admitted status at the border—meant for this to work." Justice Jackson relied on a congressional report from 1952 to argue that Congress anticipated that CBP officers would rely on the evidence before them to determine whether the returning LPR committed a crime and should be deemed an applicant for admission.

Considerations for Congress

In *Blanche v. Lau*, the Supreme Court held solely that the INA does not require CBP officers to prove by clear and convincing evidence at U.S. ports of entry that returning LPRs fall under one of the six exceptions in § 1101(a)(13)(C) to be deemed applicants for admission. It may lead lower courts to determine what evidentiary standard—if any—applies to CBP officers' determination that a returning LPR is an applicant for admission.

Congress has legislative options after the Court's ruling in *Lau* as applied to returning LPRs that CBP officers deem applicants for admission because they have committed certain specified criminal offenses under § 1101(a)(13)(C)(v). One option for Congress is to simply allow future lower courts to clarify DHS's burden for determining when a returning LPR should be deemed an applicant for admission and to leave the statute as currently written. At least one legal commentator has argued that because a serious criminal charge "is generally accepted as satisfying formal evidentiary standards such as 'clear and convincing' or 'probable cause' for a search," it should be sufficient for a CBP officer to deem a returning LPR an applicant for admission when a criminal charge falling under § 1101(a)(13)(C)(v) is pending.

Alternatively, Congress might consider codifying the clear and convincing standard or, more broadly, clarifying what evidentiary burden should be imposed on DHS under § 1101(a)(13)(C) to deem that a returning LPR falls under one of the six exceptions and should be seen as seeking admission. Some legal commentators have expressed concern that returning LPRs with open criminal cases could be denied reentry without those charges having first been adjudicated in a criminal court and have argued that a high evidentiary standard should be required at ports of entry.

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